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REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 19 OF SECURITY COUNCIL RESOLUTION 687 (1991)

INTRODUCTION

1. The present report is submitted pursuant to paragraph 19 of Security Council resolution 687 (1991) of 3 April 1991. In paragraph 16 of that resolution, the Council reaffirmed that Iraq "is liable, under international law, for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait". In paragraph 17 of the resolution, the Council decided "that all Iraqi statements made since 2 August 1990 repudiating its foreign debt are null and void", and demanded that "Iraq adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt". The Council also decided, in paragraph 18 of the resolution, "to create a fund to pay compensation for claims that fall within the scope of paragraph 16 ... and to establish a Commission that will administer the fund".

2. In paragraph 19 of the resolution, the Security Council directed the Secretary-General "to develop and present to the Security Council for decision, no later than 30 days following the adoption of the present resolution, recommendations for the fund to meet the requirement for the payment of claims established in accordance with paragraph 18 ..., and for a programme to implement the decisions in paragraphs 16, 17 and 18 ..., including: administration of the fund; mechanisms for determining the appropriate level of Iraq's contribution to the fund based on a percentage of the value of the exports of petroleum and petroleum products from Iraq not to exceed a figure to be suggested to the Council by the Secretary-General, taking into account the requirements of the people of Iraq, Iraq's payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy; arrangements for ensuring that payments are made to the fund; the process by which funds will be allocated and claims paid; appropriate procedures for evaluating losses, listing claims and verifying their validity and resolving disputed claims in respect of Iraq's liability as specified in paragraph 16 ...; and the composition of the Commission

designated [in paragraph 18]". In making the following recommendations, I have borne in mind the need for maximum transparency, efficiency, flexibility and economy in the institutional framework that will be required for the implementation of the decisions contained in paragraphs 16, 17 and 18 of the resolution.

I. INSTITUTIONAL FRAMEWORK

A. The Fund

3. The Fund created by paragraph 18 of Security Council resolution 687 (1991) will be established by the Secretary-General as a special account of the United Nations. The Fund will be known as the United Nations Compensation Fund (hereinafter referred to as "the Fund"). The Fund will be operated in accordance with the United Nations Financial Regulations and Rules. As a special account of the United Nations, the Fund, therefore, will enjoy, in accordance with Article 105 of the Charter and the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, 1/ the status, facilities, privileges and immunities accorded to the United Nations. The Fund will be used to pay compensation for "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait" as provided for in paragraph 16 of resolution 687 (1991).

B. The Commission

4. The Fund is to be administered by the Commission established by the Security Council in paragraph 18 of resolution 687 (1991). The Commission, which is to be known as the United Nations Compensation Commission (hereinafter referred to as "the Commission"), will function under the authority of the Security Council and be a subsidiary organ thereof. In accordance with the terms of paragraph 19 of resolution 687 (1991), in carrying out its functions, the Commission will be required to address a variety of complex administrative, financial, legal and policy issues, including the mechanism for determining the level of contribution to the Fund; the allocation of funds and payments of claims; the procedures for evaluating losses, listing claims and verifying their validity; and resolving disputed claims. In the light of the multifarious nature of the tasks to be performed by the Commission, it will, in my view, be necessary to distinguish between questions of policy and the functional aspects of the Commission's work. The Commission should, therefore, operate at a policy-making level and a functional level. A secretariat will be necessary for servicing the work of the Commission at both the policy-making and the functional levels.

C. Structure and composition of the Commission

5. The principal organ of the Commission will be a 15-member Governing Council composed of the representatives of the current members of the Security Council at any given time. The Governing Council will be assisted by a number of commissioners who will perform the tasks assigned to them by the Governing Council. The precise number of commissioners will be determined by the Governing Council in the light of the tasks to be performed. The commissioners will be experts in fields such as finance, law, accountancy, insurance and environmental damage assessment, who will act in their personal capacity. They will be nominated by the Secretary-General and appointed by the Governing Council for specific tasks and terms. In nominating the commissioners, the Secretary-General will pay due regard to the need for geographical representation, professional qualifications, experience and integrity. The Secretary-General will establish a register of experts which might be drawn upon when commissioners are to be appointed.

6. A secretariat, composed of an Executive Secretary and the necessary staff, will be established to service the Commission. The Executive Secretary's primary responsibility will be the technical administration of the Fund and the servicing of the Commission. He will be appointed by the Secretary-General after consultation with the Governing Council. The staff of the secretariat will be appointed by the Secretary-General. The Executive Secretary and staff will serve under the United Nations Staff Regulations and Rules.

D. Status, privileges and immunities of the Commission

7. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 1/ will apply to the Commission and its secretariat. The members of the Governing Council will have the status of representatives of States, the commissioners will have the status of experts on missions within the meaning of article VI of the Convention and the Executive Secretary and the staff of the secretariat will have the status of officials within the meaning of articles V and VII of the Convention.

E. Expenses of the Commission

8. The expenses of the Commission will be borne by the Fund. More detailed recommendations regarding the budgetary administration of the Commission are set out in paragraph 29 below.

F. Headquarters of the Commission

9. For reasons of economy and practicality, particularly in the secretariat servicing of the Governing Council and the commissioners, the headquarters of the Commission should be in New York. Alternatively, it might be located at the site of one of the two Offices of the United Nations in Europe, i.e.

Geneva or Vienna. The Governing Council may decide whether some of the activities of the Commission should be carried out elsewhere.

G. Functions of the Commission

1. The Governing Council

10. As the policy-making organ of the Commission, the Governing Council will have the responsibility for establishing guidelines on all policy matters, in particular, those relating to the administration and financing of the Fund, the organization of the work of the Commission and the procedures to be applied to the processing of claims and to the settlement of disputed claims, as well as to the payments to be made from the Fund. In addition to its policy-making role, the Governing Council will perform important functional tasks with respect to claims presented to the Commission. Except with regard to the method of ensuring that payments are made to the Fund, which should be decided upon by consensus, the decisions of the Governing Council should be taken by a majority of at least nine of its members. No veto will apply in the Governing Council. If consensus is not achieved on any matter for which it is required, the question will be referred to the Security Council on the request of any member of the Governing Council. The Governing Council may invite States that it considers to have particular interest in its work to participate without a vote in its discussions. It may also invite members of the United Nations Secretariat or other persons to supply it with information or to give other assistance in examining matters within its competence. The Governing Council will, on behalf of the Commission, report periodically to the Security Council.

2. The commissioners

11. The commissioners will, under the guidelines established by the Governing Council, carry out such tasks and responsibilities as may be assigned to them by the Governing Council.

3. The secretariat

12. Under the direction of the Executive Secretary, the secretariat will carry out such tasks as may be assigned to it by the Governing Council and the commissioners, in particular the technical administration of the Fund, and the provision of secretariat services to the Governing Council and the commissioners.

II. THE IMPLEMENTATION OF THE DECISIONS CONTAINED IN PARAGRAPHS 16, 17 AND 18 OF RESOLUTION 687 (1991)

A. Mechanisms for determining the appropriate level of Iraq's contribution to the Fund

13. In accordance with the institutional framework outlined in section I above, it would be for the Governing Council to establish the mechanisms for determining the appropriate level of Iraq's contribution to the Fund in accordance with the criteria laid down in paragraph 19 of Security Council resolution 687 (1991). In carrying out this task, the Governing Council should consider the probable levels of future oil export revenues of Iraq, the amounts of military spending and arms imports in the past, the service of Iraq's foreign debt and the needs for reconstruction and development in the country. The objective should be to settle compensation claims within a reasonable period of time. The Governing Council will, of course, be free to draw upon expert advice as it sees fit. It might wish to be assisted by one or more commissioners who, under the guidance of and within the terms of reference provided by the Governing Council, might give advice with regard to the appropriate level of Iraq's contribution to the Fund as well as to the periodic monitoring of that level of contribution. Simultaneously with the establishment of the Governing Council, I will undertake the appropriate consultations as required by paragraph 19 of resolution 687 (1991) so that, as soon as possible, I will be in a position to suggest the figure not to be exceeded by the Iraqi contribution.

B. Arrangements for ensuring that payments are made to the Fund

14. The arrangements for ensuring payments to the Fund are among the most technical and difficult of the tasks that have been entrusted to the Commission. The decisions taken in this regard will determine, inter alia, the financial viability of the Fund and its capacity to meet the compensation claims decided upon by the Commission as well as the size and organization of the secretariat.

15. In addressing the question of the possible arrangements for ensuring payments to the Fund, there is an obvious necessity for securing constant and reliable financing of the Fund, without which the essential purpose of the Fund will be defeated. It is also desirable to seek modalities for the financing of the Fund that avoid the necessity of legal and other proceedings in a multiplicity of third countries and jurisdictions.

16. The legal basis for the payments by Iraq to the Fund is to be found in paragraph 19 of resolution 687 (1991). Iraq has officially notified the United Nations of its acceptance of the provisions of the resolution, including paragraph 19, in accordance with paragraph 33 of the resolution. It follows from paragraph 19 of resolution 687 (1991) that the method envisaged by the Security Council for the financing of the Fund is a contribution by Iraq based on a percentage of the value of its exports determined in

accordance with the mechanism referred to in paragraph 13 above. It also follows from the resolution that the Security Council did not envisage using "frozen assets" of Iraq held in third countries for the financing of the Fund.

17. Under these circumstances, there are several options for ensuring that Iraq makes payments to the Fund. These options include the following:

(a) Iraq would pay to the Fund the established percentage of the market value of its exports of petroleum and petroleum products; the market value to be calculated on the day of the export. The payment would be effected in United States dollars and made within 30 days of the export from Iraq;

(b) An escrow account would be opened into which Iraq would deposit advance payments of lump sums equivalent to the estimated quarterly or semi-annual contribution required of it. These lump-sum payments would be re-evaluated periodically;

(c) A physical share of the exports would be taken and sold on the market on behalf of the Fund;

(d) The Fund would be designated as either the sole or co-beneficiary on the bill of lading or other title document and any letter of credit issued. The Fund, in turn, would retain its share and remit the remainder to Iraq;

(e) An escrow account provided with the appropriate privileges and immunities (e.g. at a central bank or an appropriate international institution) would be designated as beneficiary on the bill of lading or other title document and any letter of credit issued. The escrow agent would remit to the Fund the sum designated to be used to satisfy claims and the remainder to Iraq.

It would be for the Governing Council to decide among these various options.

18. All of these methods presuppose cooperation by Iraq and strict supervision of the exports of petroleum and petroleum products from Iraq. To this end, the Commission should arrange for appropriate monitoring. Whatever approach is adopted, should Iraq fail to meet its payment obligation, the Governing Council would report the matter to the Security Council.

19. It must be recognized that, in all probability, it may be some time before Iraq is able to resume oil exports. In the short term, the Fund is therefore unlikely to receive revenues, and some consideration will have to be given to the financing of the work of the Commission, a problem which is addressed in paragraph 29 below, but more particularly to the financing of the Fund in the near term from assets other than resumed oil exports by Iraq.

C. Claims procedure

20. The process by which funds will be allocated and claims paid, the appropriate procedures for evaluating losses, the listing of claims and the

verification of their validity and the resolution of disputed claims as set out in paragraph 19 of resolution 687 (1991) - the claims procedure - is the central purpose and object of paragraphs 16 to 19 of resolution 687 (1991). It is in this area of the Commission's work that the distinction between policy-making and function is most important. The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved. Given the nature of the Commission, it is all the more important that some element of due process be built into the procedure. It will be the function of the commissioners to provide this element. As the policy-making organ of the Commission, it will fall to the Governing Council to establish the guidelines regarding the claims procedure. The commissioners will implement the guidelines in respect of claims that are presented and in resolving disputed claims. They will make the appropriate recommendations to the Governing Council, which in turn will make the final determination. The recommendations that follow have been divided for the sake of convenience under three main headings: the filing of claims; the processing of claims; and the payments of claims.

1. Filing of claims

21. With regard to the filing of claims, the Governing Council must first decide in what manner the claims of foreign Governments, nationals and corporations are to be filed with the Commission. It is recommended that the Commission should entertain, as a general rule, only consolidated claims filed by individual Governments on their own behalf or on behalf of their nationals and corporations. The filing of individual claims would entail tens of thousands of claims to be processed by the Commission, a task which could take a decade or more and could lead to inequalities in the filing of claims disadvantaging small claimants. It will be for each individual Government to decide on the procedures to be followed internally in respect of the consolidation of the claim having regard to its own legal system, practice and procedures. The Governing Council may, in addition, consider whether, in exceptional circumstances involving very large and complex claims, a somewhat different procedure could apply. The question might be considered whether such claims, the character of which, of course, would have to be defined by the Governing Council, could be filed individually with the Commission by Governments, nationals or corporations and whether the individual Government, national or corporation could be authorized to present these claims.

22. In this context, there is another matter that requires consideration by the Commission and regarding which the Governing Council should establish guidelines, namely the question of the exclusivity or non-exclusivity of the claims procedure foreseen in paragraph 19 of the resolution. It is clear from paragraph 16 of the resolution that the debts and obligations of Iraq arising prior to 2 August 1990 are an entirely separate issue and will be addressed "through the normal mechanisms". It is also clear from paragraph 16 that the

resolution and the procedure foreseen in paragraph 19 relate to liability under international law. Resolution 687 (1991) could not, and does not, establish the Commission as an organ with exclusive competence to consider claims arising from Iraq's unlawful invasion and occupation of Kuwait. In other words, it is entirely possible, indeed probable, that individual claimants will proceed with claims against Iraq in their domestic legal systems. The likelihood of parallel actions taking place on the international level in the Commission and on the domestic level in national courts cannot be ignored. It is, therefore, recommended that the Governing Council establish guidelines regarding the non-exclusivity of claims and the appropriate mechanisms for coordination of actions at the international and domestic levels in order to ensure that the aggregate of compensation awarded by the Commission and a national court or commission does not exceed the amount of the loss. A particular problem might arise in this regard concerning default judgements obtained in national courts.

23. In addition to deciding on the consolidation of claims, the Governing Council may also wish to establish a categorization of claims according to both type and size. The categorization of claims according to type might, for example, distinguish between claims for loss of life or personal injury and property damage, environmental damage or damage due to the depletion of natural resources. The categorization of claims by size might for example, differentiate between small-, medium- and large-sized claims. A further categorization might be to distinguish between losses incurred by Governments, on the one hand, and losses incurred by nationals and corporations, on the other hand.

24. Governments could be requested by the Governing Council to use these categorizations when filing their consolidated claims. The Governing Council should also establish guidelines regarding the formal requirements for the presentation of claims such as the type of documentation to be presented in support of the claim and the time-delays for the filing of claims. The time-delays should be of sufficient length to permit Governments to establish and implement an internal procedure for the assembling and consolidation of claims. It is recommended that a fixed time period be established for the filing of all claims. A period of two years from the adoption of the filing guidelines would appear to be adequate. Alternatively, the Governing Council could set different filing periods for different types of claims in order to ensure that priority is given to certain claims, for example, loss of life or personal injury. In this respect, I am of the opinion that there would be some merit in providing for a priority consideration of small claims relating to losses by individuals so that these are disposed of before the consideration of claims relating to losses by foreign Governments and by corporations.

2. Processing of claims

25. The processing of claims will entail the verification of claims and evaluation of losses and the resolution of any disputed claims. The major

part of this task is not of a judicial nature; the resolution of disputed claims would, however, be quasi-judicial. It is envisaged that the processing of claims would be carried out principally by the commissioners. Before proceeding to the verification of claims and evaluation of losses, however, a determination will have to be made as to whether the losses for which claims are presented fall within the meaning of paragraph 16 of resolution 687 (1991), that is to say, whether the loss, damage or injury is direct and as a result of Iraq's unlawful invasion and occupation of Kuwait. It is recommended that the Governing Council establish detailed guidelines regarding what constitutes such direct loss for the guidance of all claimants as well as the commissioners.

26. Claims will be addressed to the Commission. The Commission will make a preliminary assessment of the claims, which will be carried out by the Secretariat, to determine whether they meet the formal requirements established by the Governing Council. The claims would then be submitted to verification and evaluation by panels normally comprised of three commissioners for this purpose. In carrying out these tasks, it is recommended that the commissioners be given the necessary powers to request additional evidence, to hold hearings in which individual Governments, nationals and corporations can present their views and to hear expert testimony. The Governing Council might wish to address the question of possible assistance to ensure the adequacy of the representation of countries of limited financial means. Iraq will be informed of all claims and will have the right to present its comments to the commissioners within time-delays to be fixed by the Governing Council or the Panel dealing with the individual claim. Recommendations of the commissioners regarding the verification and evaluation of claims will be final and subject only to the approval of the Governing Council, which shall make the final determination. The Governing Council should have the power to return claims to the commissioners for further revision if it so decides.

27. Where a dispute arises out of the allegation made by a claimant that the Panel of Commissioners, in dealing with its claims, has made an error, whether on a point of law and procedure or on a point of fact, such disputes will be dealt with by a board of commissioners who for this purpose should be guided by such guidelines as have been established by the Governing Council and the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Arbitration Rules will be modified as necessary. The final decision will be made by the Governing Council.

3. Payment of claims

28. It is to be anticipated that the value of claims approved by the Commission will at any given time far exceed the resources of the Fund. It will, therefore, be incumbent upon the Commission to decide on an allocation of funds and a procedure for the payment of claims. It is recommended that the Governing Council establish criteria for the allocation of funds, taking into account the size of claims, the scope of the losses sustained by the

country concerned and any other relevant factors. In this connection, it might be necessary to distinguish between Kuwait, on the one hand, and other countries on the other hand. As far as the payment of claims is concerned, it follows from the consolidation of the claims and their filing by individual Governments that payments will be made exclusively to Governments. Individual Governments will be responsible for the appropriate distribution to individual claimants. The Governing Council should establish further guidelines regarding the payment of claims, for example, whether claims should be paid in full or whether percentages should be paid. In the latter case, the unsatisfied portions of the claims will remain as outstanding obligations.

D. Expenses of the Commission

29. The expenses of the Commission, including those of the Governing Council, the commissioners and the secretariat, should in principle be paid from the Fund. However, as some time will elapse before the Fund is adequately financed, consideration must be given to the financial implications of the programme outlined. It is recommended that urgent consideration be given to the means by which the initial costs of the Commission will be met.

Notes

1/ General Assembly resolution 22 A (I).